IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 368 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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JOSHI RAKHABEN PRAFULCHANDRA

Versus

STATE OF GUJARAT

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Appearance:

MR YV BRAHMBHATT for Petitioner

MR MA BUKHARI, LEARNED APP for Respondent No. 1

MR MM TIRMIZI for Respondent No. 2

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: /09/2000

C.A.V. JUDGEMENT

1. This revision is directed against the revisional order passed by the Additional Sessions Judge, Mehsana on May 19, 1997 disposing of two Criminal Revision

Applications under a common judgment.

2. The brief facts giving rise to this revision are as under :

The revisionist filed a complaint under sec.125 of the Code of Criminal Procedure claiming maintenance for applicant no.1 who is the mother of the remaining applicants no.2,3 and 4. The allegation of the revisionist in the Court of the Magistrate was that, she was married to one Prafulchandra Hariprasad Joshi and enjoyed married life for about 15 years. During this wed-lock, the revisionist had three children aged about 15 years, 12 years and 9 years respectively. The revisionist alleged that the respondent no.2 namely her husband was giving mental and physical torture by creating dispute regarding domestic affairs on trifling matters. It was alleged that the husband/respondent no.2 was demanding dowry after married life of 12 years and uttered certain words which caused mental cruelty to the revisionist. On account of this cruel treatment, the revisionist had to live separately with her parents. Since the respondent no.2 failed and neglected to provide maintenance to the revisionist and her three children application under sec.125 of the Code of Criminal Procedure was moved.

3. The application was contested by the respondent no.2.

4. The learned Magistrate after considering the respective contentions of the parties and evidences adduced by them found that the ingredients of sec.125 of the Criminal Procedure Code were made out and the revisionist was entitled to maintenance of Rs.225=00 per month whereas, the applicants no.2,3 and 4 before the courts below were entitled to maintenance at the rate of Rs.150=00, Rs.125=00 and Rs.100=00 per month respectively from the date of application (i.e. from September 16, 1994).

5. Against this order two revisions were preferred vide Criminal Revision Applications No.19/1996 and 26/1996. In Criminal Revision Application No.26/1996, the husband viz. respondent no.2 challenged the order of the learned Magistrate whereas, in Criminal Revision Application No.19/1996 the four claimants prayed for enhancement of the maintenance amount fixed by the learned Magistrate.

6. These two revisions were disposed of by a common

order. Criminal Revision Application No.19/1996 was partly allowed and maintenance allowance for the children/applicants no.2,3 and 4 was respectively enhanced to Rs.250=00, Rs.200=00 and Rs.150=00 per month with effect from the date of the application.

7. Criminal Revision Application No.26/1996 filed by the husband/respondent no.2 was partly allowed and the maintenance granted to the wife namely the revisionist before me was disallowed holding that she is not entitled to claim any maintenance from her husband.

8. In this revision, learned counsel for the revisionist vehemently argued that the court below has wrongly held that the revisionist is not entitled to maintenance.

9. I have heard arguments of Shri YB Brahmbhatt, learned counsel for the revisionist and Shri MM Tirmizi, learned counsel for respondent no.2 as well as learned APP for respondent no.1. It is settled law that the revisional Court while exercising revisional powers cannot reappreciate evidence with a view to substitute its own finding unless perversity in the judgment under revision is found or it is found that the trial Court has misread the evidence or has misappreciated the evidence or has based finding on inadmissible evidence. Normally, inference in revision should not be done except on above grounds. From the judgment of the lower revisional Court, it appears that it was guided by philosophical, psychological and sociological considerations which is hi-lighted in para 11 of the impugned judgment. The learned Magistrate found that the revisionist was entitled to maintenance from her husband. This finding was based on appreciation of evidence on record by the trial Court namely that the revisionist, on account of mental and physical cruelty practised by her husband had to live separately with her parents and that she had no independent income to maintain herself and her children. Even, the revisional Court, in its judgment found that the revisionist left for Sambalpur with her three children and thereafter, she was staying in the house of her mother at Sambalpur. The revisional Court did not care to consider whether during this stay the revisionist had any independent income to maintain herself or not. Income of the parents of the revisionist for the purposes of sec.125 of the Criminal Procedure Code will not be considered to be an amount at the disposal of the revisionist from which she can be expected to maintain herself. Even if, the parents of the revisionist were maintaining the revisionist during those hard days, it

cannot be said that she was having independent means or independent income for her maintenance. A vague observation has been made by the lower revisional Court that no evidence has been adduced by the revisionist to substantiate the allegation made against the husband. While making this observation the lower revisional Court did not hold that the finding of the learned Magistrate is based on no evidence or is based on mere surmises and conjectures.

10. It further appears that the lower revisional Court was some what swayed away by the deposition of the husband that he was ready and willing to keep his wife and children with him. This statement was not wholly accepted by the lower revisional Court in as much as it granted maintenance allowance at enhanced rate to the three children. Even if, such offer was made by the husband when he was in the witness box in the trial Court, it cannot be said that the husband did not neglect to maintain his wife. The lower Court was not justified in making observation that the trial Court has assigned certain reasons drawing certain presumptions and assumptions to the effect which is not possible in Hindu family. Such casual and vague observation could not be a ground for disturbing the findings recorded by the trial Court which are based on proper appreciation of evidence on record. Inspite of the fact that the lower revisional Court, in para 9 of its judgment, observed that, "in matrimonial cases and in cases under sec.125 of the Code of Criminal Procedure, there should be reconsideration as well as reappreciation of evidence adduced by the parties in a revision under sec.397 of the Code of Criminal Procedure in order to ascertain the legality, validity and proprietary of the impugned order," while discussing the matter he forgot these observations made by him earlier and made unnecessary observations against the learned Magistrate. It seems that the lower revisional Court instead of properly appreciating the evidence was guided by his philosophical, psychological and sociological approach enumerated in para 11 of its judgment. The ultimate conclusion of the lower revisional Court that the revisionist had failed to prove that the husband had neglected or refused to maintain herself is based on mere surmises and conjectures without cogent reference to the evidence on record. As such, the observation that the revisionist is not entitled to claim maintenance is wholly unfounded and patently illegal as well as perverse. The trial Court, considering the entire evidences and circumstances of the case found that the husband had abondoned the applicant and had given her physical and mental torture on account of which the

revisionist and her children were forced to live separately and no maintenance was provided to them. These findings were not specifically set-aside by the revisional Court. Consequently, the finding of the trial Court has to be accepted that the revisionist was subjected to physical as well as mental cruelty by her husband on account of which she had to leave the matrimonial home after about 15 years of marriage alongwith her three children, and that thereafter, no maintenance was provided to them by the husband.

11. On the above finding, normally, the wife is entitled to maintenance unless the husband is able to substantiate and establish by cogent and reliable evidence that the wife had, during this period, independent income for her maintenance. On this point also the findings of the lower revisional Court are casual and unsustainable. There is some mention in para 13 of the judgment that the revisionist inherited certain immovable properties from her father and husband at Sambalpur as well as at Gandhinagar. However, the details of property so inherited have not been given by the lower Court. Likewise, there is another observation that the revisionist was having separate bank account at Kalol. Again, the account number or the amount standing in this account has not been disclosed by the lower Court. On this point, the learned Magistrate has considered the documentary evidence on record. Copy of evaluation report Ex.34 from the Municipality was taken into consideration. There was also allegation that the revisionist had inherited properties after the death of her father, for which Ex.30 to Ex.34 were referred. These documents were given due consideration by the trial Magistrate. He found that from the receipt of House Tax vide Ex.34, no inference can be drawn that the property belonged to the revisionist or the revisionist herself purchased the said properties. The learned Magistrate further considered the statement of the husband in examination-in-chief as well as during cross examination and he has rightly observed that the statement of the husband as a whole was in the nature of hearsay and he has no definite knowledge that the flat was purchased by the revisionist from the amount received from Sambalpur or that the amount was given by the father-in-law to the revisionist. The learned Magistrate further found that it was not proved that the revisionist purchased any flat in her own name from her own income. The learned Magistrate has rightly observed that even if the father of the revisionist had properties of lacks of rupees, it cannot be a ground for depriving the revisionist of her legal right to obtain maintenance from her husband.

12. Regarding inheritance of immovable properties by the revisionist from her parents reference was made to Village Form No.7/12 but, the husband himself stated that the properties obtained by the revisionist namely his wife through succession after the death of Prabhashanker Dayabhai could not be established because neither succession was entered in Village Form No.7/12 nor the names of heirs are entered in the said form. In face of this admission of the husband, the learned Magistrate was justified in observing that it was not established that the revisionist obtained by succession immovable properties from her father. These findings were not considered nor specifically set-aside by the lower revisional Court. The findings which are based on proper appreciation and which were recorded by the trial Magistrate are just, reasonable and legal.

13. The trial Magistrate awarded maintenance to the revisionist at the rate of Rs.225=00 per month. The learned counsel for the revisionist before me has argued that this is an insignificant amount. He has referred to the income of the husband/respondent no.2 and also to the fact that the respondent no.2 has inherited properties from his father. In any event, even the lower revisional Court was not satisfied with the amount of maintenance awarded to three minor children and enhanced it from Rs.150=00, Rs.125=00 and Rs.100=00 per month to Rs.250=00, Rs.200=00 and Rs.150=00 per month respectively. Thus, there is no reason why the amount of maintenance to the revisionist should not be enhanced.

14. Looking to the income of the husband/respondent no.2 and to his means and liabilities, I think maintenance to the revisionist at the rate of Rs.400=00 per month should meet ends of justice.

15. For the reasons stated above the revision succeeds and is hereby allowed. The order of the lower revisional Court refusing maintenance to the revisionist is set-aside. The revisionist is entitled to maintenance from the respondent no.2 at the rate of Rs.400=00 per month with effect from September 16, 1994.

( D.C. Srivastava, J.)

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